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DDCI

SSCI HEARING

Goldwater-sponsored FOIA Bill

21 June 1983

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DDCI's FOIA Testimony

21 June 1983

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Statement of

JOHN N. MCMAHON

DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE

Before

THE SENATE SELECT COMMITTEE ON INTELLIGENCE

Tuesday, 21 June 1983

2:00 p.m.

Mr. Chairman, Members of the Select Committee on Intelligence, it is a pleasure to appear before you today to discuss S. 1324. The Central Intelligence Agency urges enactment of this Bill. It is carefully crafted to have positive benefits for all those affected by it. It is unique legislation in this area of conflicting public interests because it does not require the agonizing trade-offs between protection of the Agency's intelligence mission and the public's access to government information. In essence, this legislation would exclude the Agency's sensitive operational files from a search and review process that results in an ever-present risk of exposure of sources and methods, and creates a perceived risk on the part of our sources and potential sources which greatly impairs the work of this Agency. At the same time, with this exclusion, the public would receive improved service from the Agency under the FOIA without any meaningful loss of information now released under the Act. ~~It is hoped the CIA can substantially curtail the present 2-3-year wait that requesters must now endure.~~

Under present law, there is in effect a presumption of access to CIA operational files, and the Agency must defend a denial of our most sensitive information to anyone who asks for it line by line, sometimes word by word. We, of course, attempt to assure our sources, who live in fear of this process, that the exemptions available under the FOIA are sufficient to protect their identities, but that assurance is

too often seen as hollow. They ask, with justification in my view, that, in exchange for the risks which they undertake on our behalf, we provide them with an absolute assurance of confidentiality. So long as we are compelled by law to treat our operational files as potentially public documents, we are unable to provide the iron-clad guarantee which is the backbone of an effective intelligence service. In addition, the review of operational files withdraws uniquely capable personnel from intelligence operations, and compels us to violate our working principles of good security. Let me explain these points in more detail.

For security reasons, Agency information is compartmented into numerous self-contained file systems which are limited in order to serve the needs of a particular component or to accomplish a particular function. Agency personnel are given access to specific filing systems only on a "need to know" basis. Operational files are more stringently compartmented because they directly reveal intelligence sources and methods. Yet a typical request under the FOIA will seek information on a generally described subject wherever it may be found in the Agency and will trigger a search which transgresses all principles of compartmentation. A relatively simple FOIA request may require as many as 21 Agency records systems to be searched, a difficult request can involve <sup>NUMEROUS TO</sup> ~~over~~ 100.  
OVER

In many instances the results of these searches are prodigious. Thousands of pages of records are amassed for review. Here is a graphic illustration of the product of an FOIA search. [Exhibit 1] Although, in the case of records gleaned from operational files, virtually none of this information is released to the requester, security risks remain which are inherent in the review process. The documents are scrutinized line by line, word by word, by highly skilled operational personnel who have the necessary training and experience to identify source-revealing and other sensitive information. These reviewing officers must proceed upon the assumption that all information released will fall into the hands of hostile powers, and that each bit of information will be retained and pieced together by our adversaries in a painstaking effort to expose secrets which the Agency is dedicated to protect. At the same time, however, the reviewing officer must be prepared to defend each determination that an item of information is classified or otherwise protected under the FOIA. Furthermore, the officer must bear in mind that under the FOIA each "reasonably segregable" item of unprotected information must be released. Sentences are carved into their intelligible elements, and each element is separately studied. When this process is completed for operational records, the result is usually a composite of black markings, interspread with a few disconnected phrases which have been approved for release. ~~Here is~~ <sup>we have removed black markings</sup> a typical example. [Exhibit 2]

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The public derives little or nothing by way of meaningful information from the fragmentary items or occasional isolated paragraph which is ultimately released from operational files. Yet we never cease to worry about these fragments. We cannot be completely certain of the composite information in our adversaries possession or what further element they need to complete a picture. Perhaps we missed the source-revealing significance of some item. Perhaps we misplaced one of the black markings. The reviewing officer is confronted with a dizzying task of defending each deletion without releasing any clue to the identity of our sources. He has no margin for error. Those who have trusted us may lose their reputation, their livelihood, or their lives; the well-being of their families is at stake if one apparently innocuous item falls into hostile hands and turns out to be a crucial lead. As long as the process of FOIA search and review of CIA operational files continues, this possibility of error cannot be eradicated. The harm done to the Agency's mission by such errors is, of course, unknown and uncalculable. The potential harm is, in our judgment, extreme.

Aside from this factor of human error, we recognize that, under the current Freedom of Information Act, subject to judicial review, national security exemptions do exist to protect the most vital intelligence information. The key point, however, is that those sources upon whom we depend for that information have an entirely different perception.

I will explain how that perception has become for us a reality which hurts the work of the Agency on a daily basis. The gathering of information from human sources remains a central part of CIA's mission. In performance of this mission, Agency officers must, in essence, establish a secret contractual relationship with people in key positions with access to information that might otherwise be inaccessible to the United States Government.

This is not an easy task, nor is it quickly accomplished. The principal ingredient in these relationships is trust. To build such a relationship, which in many cases entails an individual putting his life and the safety of his family in jeopardy to furnish information to the U.S. Government, is a delicate and time-consuming task. Often, it takes years to convince an individual that we can protect him. Even then, the slightest problem, particularly a breach or perceived breach of trust, can permanently disrupt the relationship. A public exposure of one compromised agent will obviously discourage others.

One must recognize also that most of those who provide us with our most valuable and therefore most sensitive information come from societies where secrecy in both government and everyday life prevails. In these societies, individuals suspected of anything less than total allegiance to the ruling party or ~~REGIME~~ ~~elite~~ can lose their lives. In societies such as these, the



concepts behind the Freedom of Information Act are totally alien, frightening, and indeed contrary to all that they know. It is virtually impossible for most of our agents and sources in such societies to understand the law itself, much less why the CIA operational files, in which their identities are revealed, should be subject to the Act. It is difficult, therefore, to convince one who is secretly cooperating with us that some day he will not awaken to find in a U.S. newspaper or magazine an article that identifies him as a CIA spy.

Also, imagine the shackles being placed on the CIA officer trying to convince the foreign source to cooperate with the United States. The source, who may be leaning towards cooperation, will demand that he be protected. He wants absolute assurance that nothing will be given out which could conceivably lead his own increasingly sophisticated counter-intelligence service to appear at his doorstep. Of course, access to operational files under FOIA is not the only cause of this fear. Leaks, unauthorized disclosures by former Agency employees, and espionage activities by foreign powers all contribute, but the perceived harm done by the FOIA is particularly hard for our case officers to explain because it is seen as a deliberate act of the United States Government.

Although we try to give assurances to these people, we have on record numerous cases where our assurances have not sufficed. Foreign agents, some very important, have either

refused to accept or have terminated a relationship on the grounds that, in their minds -- and it is unimportant whether they are right or not -- but in their minds the CIA is no longer able to absolutely guarantee that they can be protected. How many cases of refusal to cooperate where no reason is given but if known would be for similar reasons, I cannot say. I submit, however, that, based upon the numerous cases of which we are aware, there are many more cases of sources who have discontinued a relationship or reduced their information flow based on their fear of disclosure. No one can quantify how much information vital to the national security of the United States has been or will be lost as a result.

The FOIA also has had a negative effect on our relationships with foreign intelligence services. Our stations overseas continue to report increasing consternation over what is seen as an inability to keep information entrusted to us secret. Again, the unanswerable question is how many other services are now more careful as to what information they pass to the United States.

This legislation will go a long way toward relieving the problems that I have outlined. The exclusion from the FOIA process of operational files will send a clear signal to our sources and to those we hope to recruit that the information which puts them at risk will no longer be subject to the process. They will know that their identities are not likely

to be exposed as a result of a clerical error and they will know that the same information will be handled in a secure and compartmented manner and not be looked at by people who have no need to know that information. A distinguished Judge of the U.S. Court of Appeals, Judge Robert Bork, in a recent dissenting opinion, had this to say about the need to protect those sources that provide valuable information to the nation: "The CIA and those who cooperate with it need and are entitled to firm rules that can be known in advance rather than vague standards whose application to particular circumstances will always be subject to judicial second-guessing. Our national interest, which is expressed in the authority to keep intelligence sources and methods confidential, requires no less."

At the same time, as I have explained before, by removing these sensitive operational files from the FOIA process, the public is deprived of no meaningful information whatsoever.

The paltry results from FOIA review of operational files are inevitable. These records discuss and describe the nuts and bolts of sensitive intelligence operations. Consequently they are properly classified and are not releaseable under the FOIA as it now stands. The reviewing officers who produce these masterpieces of black markings are doing their job and doing it properly. It is crucial to note in this regard that their determinations have been consistently upheld when tested

in litigation. The simple fact is that information in operational records is by and large exempt from release under the FOIA, and the few bits and pieces which are releasable have no informational value.

When I speak of reviewing officers absorbed in this process, it is important to stress that these individuals are not and cannot be simply clerical staff or even "FOIA professionals." In order to do their job, they must be capable of making difficult and vitally important operational judgments, and consequently most of them must come from the heart of the Agency's intelligence cadre. Moreover, before any item of information is released under the FOIA, the release must be checked with a desk officer with current responsibility for the geographical area of concern. Hence, we must not only remove intelligence officers on a full-time basis from their primary duties, we must also continually tap the current personnel resources of our operating components. That is so because we have a practice in the Operations Directorate which requires that every piece of paper which is released, even including those covered with black marks like the one I showed you before, must be reviewed by an officer from the particular desk that wrote the documents or received it from the field, and we cannot alter this practice because the risk of compromise is so great. You can imagine the disruption, for example, on the Soviet desk when the people there must take time off from the

work they are supposed to do <sup>IN ORDER</sup> to review a document prepared for release under the FOIA. And it is obvious, of course, that, when a CIA operation makes the front pages of the newspapers, the FOIA requests on that subject escalate. This loss of manpower cannot be cured by an augmentation of funding. We cannot hire individuals to replace those lost, we must train them. After the requisite years of training, they are a scarce resource needed in the performance of the Agency's operational mission.

Let me make clear that this legislation exempts from the FOIA only specified operational files. It leaves the public with access to all other Agency documents and all intelligence disseminations, including raw intelligence reports direct from the field. Files which are not designated operational files will remain accessible under the FOIA even if documents taken from an operational file are placed in them. This will ensure that all disseminated intelligence and all matters of policy formulated at Agency executive levels, even operational policy, will remain accessible under FOIA. Requests concerning those covert actions the existence of which is no longer classified would be searched as before, without exclusion of operational files. And of particular importance, a request by a U.S. citizen or permanent resident alien for personal information about the requester would trigger all appropriate searches throughout the Agency without exception.

I would also like to address the benefit to the public from this legislation. ~~As I mentioned earlier in my testimony,~~ <sup>Because of the backlog</sup> FOIA requesters now wait two to three years to receive a final response to their requests for information when they involve the search and review of operational files within the Directorate of Operations. We estimate that, should S. 1324 be enacted, the CIA could in a reasonable time substantially reduce the FOIA queue. Indeed, if this Bill is enacted, ~~we assure you that~~ every effort will be made to pare down the queue as quickly as possible. This would surely be of great benefit if the public could receive final responses from the CIA in a far more timely and efficient manner. The public would continue to have access to the disseminated intelligence product and all other information in files which would not be designated under the terms of the Bill.

There is one final issue, Mr. Chairman, which I would like to address before concluding my testimony. This is the issue of how it would be possible for the American public to have access to information concerning any Agency intelligence activity that was improper or illegal. My firm belief is that, given the specific guidance which we now have in Executive orders and Presidential directives along with the effective oversight provided by this Committee and its counterpart in the House, there will not ever again be a repeat of the improprieties of the past. And let me assure you that Bill Casey

and I consider it our paramount responsibility that the rules and regulations not be violated. However, should there be an investigation by the Inspector General's office, the Office of General Counsel, or my own office of any alleged impropriety or illegality, and it is found that these allegations are not frivolous, records of such an investigation will be found in nondesignated files. In such a case, information relevant to the subject matter of the investigation would be subject to search and review in response to an FOIA request because this information would be contained in files belonging to the Inspector General's office, for example, and these files cannot be designated under the terms of this Bill. The same would be true, for similar reasons, Mr. Chairman, <sup>IF UNDER THE CONGRESSIONAL OVERSIGHT ACT</sup> whenever a senior Intelligence Community official reports an illegal intelligence activity to this Committee or to the House Intelligence Committee ~~pursuant to the requirements in Section 501 of the National Security Act.~~

Mr. Chairman, the CIA urges adoption of this legislation, and I understand that the Administration also supports your Bill. This concludes my testimony, Mr. Chairman. I have with me my Deputy General Counsel, [REDACTED] as well as Chief of the Information Privacy Division, [REDACTED]

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In addition, accompanying me to provide substantive expertise are Deputy Director for Operations John Stein, Deputy Director for Science and Technology Evan Hineman, Director of Security

as well as others who will be pleased to

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answer any specific questions you or the other Members may have.

In concluding, Mr. Chairman, I would like to ~~quote from the~~ <sup>NOTE THE WORDS</sup>  
~~opinion~~ of Judge Gerhard Gesell of the U.S. District Court for  
<sup>IN ADDRESSING AN FOIA CASE HE SAID.</sup>  
the District of Columbia, "It is amazing that a rational society  
tolerates the expense, the waste of resources, the potential  
injury to its own security which this process necessarily entails."  
<sup>I SHARE HIS VIEWS. WE NEEDS S 1324.</sup>  
Thank you. <sup>THIS COUNTRY</sup>